

MEMORANDUM OF UNDERSTANDING
between the
Alaska Division of Governmental Coordination
and the
Western Federal Land Highway Division
of the
Federal Highway Administration

June 1996

Signature Page

This Memorandum of Understanding is entered into by and between Western Federal Lands Highway Division of the United States Federal Highway Administration and the State of Alaska, duly executed by the parties shown below:

STATE OF ALASKA

Office of the Governor

Office of Management and Budget Western Federal Lands Highway Division

Division of Governmental Coordination

U.S. DEPARTMENT OF TRANSPORTATION,

Federal Highway Administration,

Western Federal Lands Highway Division

Diane Mayer
Director

Jim Hall
Division Engineer

Date _____

Date _____

CONCURRENCE:

John Shively, Commissioner
Alaska Department of Natural Resources

Date

Frank Rue, Commissioner
Alaska Department of Fish & Game

Date

Michele Brown, Commissioner
Alaska Department of Environmental Conservation

Date

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Introduction

I. Purpose

This Memorandum of Understanding (MOU) serves to improve cooperation, coordination, and communication between the Alaska Division of Governmental Coordination (DGC) and the Western Federal Lands Highway Division (WFLHD) of the Federal Highway Administration. A main objective is to develop an efficient, effective coastal zone consistency determination process that meets both agencies' requirements. This MOU describes the process both agencies will follow in making and reviewing consistency determinations for direct federal activities and federal land development projects that affect Alaska's coastal zone. The MOU also lists WFLHD activities that have no significant effect on coastal resources, are consistent with state and local coastal management programs, and do not need a state-coordinated determination of consistency with the Alaska Coastal Management Program (ACMP)¹.

II. Authority

The authority to enter into this agreement is based on Section 307 of the Coastal Zone Management Act (CZMA) of 1972, as amended, and 15 CFR § 930.10-930.145, the federal regulations implementing the Act. The CZMA requires that all federally conducted or supported activities affecting the coastal zone, including development projects, be undertaken in a manner consistent to the maximum extent practicable with approved state coastal management programs.

III. Termination, Alteration, and Severability

Either party may terminate the MOU, provided that party gives 60 days notice. Either party may alter the MOU by giving 30 days notice and negotiating the changes with the other party so that the changes reflect a new agreement. Should there arise any conflicts between this MOU and provisions of federal or state law, the provisions of applicable law shall prevail. The components of this MOU are severable so that it remains a useable document even if part of it becomes invalid.

¹ Municipalities may require local authorizations or consistency determinations for implementation of their coastal management programs or other planning and zoning authorities. The WFLHD should contact potentially affected coastal districts to determine local requirements.

Federal Activities

I. Coastal Zone Management Act § 307(c)(1)(A) and (c)(2)

(C)(1)(A): EACH FEDERAL AGENCY ACTIVITY WITHIN OR OUTSIDE THE COASTAL ZONE² THAT AFFECTS ANY LAND OR WATER USE OR NATURAL RESOURCE OF THE COASTAL ZONE SHALL BE CARRIED OUT IN A MANNER WHICH IS CONSISTENT TO THE MAXIMUM EXTENT PRACTICABLE WITH THE ENFORCEABLE POLICIES OF APPROVED STATE MANAGEMENT PROGRAMS.

(C)(2): ANY FEDERAL AGENCY WHICH SHALL UNDERTAKE ANY DEVELOPMENT PROJECT IN THE COASTAL ZONE OF A STATE SHALL INSURE THAT THE PROJECT IS, TO THE MAXIMUM EXTENT PRACTICABLE, CONSISTENT WITH THE ENFORCEABLE POLICIES OF APPROVED STATE MANAGEMENT PROGRAMS.

II. Applicable WFLHD Activities

A. Federal Activity

This agreement applies to WFLHD activities and development projects as defined by 15 CFR §930.31 (1995):

(a) THE TERM "FEDERAL ACTIVITY" MEANS ANY FUNCTIONS PERFORMED BY OR ON BEHALF OF A FEDERAL AGENCY IN THE EXERCISE OF ITS STATUTORY RESPONSIBILITIES.

(b) A FEDERAL DEVELOPMENT PROJECT IS A FEDERAL ACTIVITY INVOLVING THE PLANNING, CONSTRUCTION, MODIFICATION, OR REMOVAL OF PUBLIC WORKS, FACILITIES, OR OTHER STRUCTURES, AND THE ACQUISITION, UTILIZATION, OR DISPOSAL OF LAND OR WATER RESOURCES.

B. 23 U.S.C.

² Section 306(d)(2) of the Coastal Zone Management Act requires each state to identify the boundaries of the coastal zone. The seaward limit is "outer limit of the State title and ownership under the Submerged Lands Act (43 U.S.C. 1301 et. seq.)." CZMA § 304(1). The Alaska Coastal Policy Council adopted inland boundaries based on biophysical considerations and directed each coastal district to develop a final coastal zone boundary. The ~~Coastal Zone Boundaries of Alaska Atlas (Alaska Department of Fish and Game, and Division of Governmental~~ Coordination, June 1988 as amended) compiles maps and definitions for all of the coastal zone boundaries in Alaska.

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This agreement specifically applies to WFLHD actions and projects described in 23 U.S.C., limited to:

1. The portion of the federal lands highway program entitled, Public Lands Highways, including the Forest Highway Program³, in 23 U.S.C. § 204.
2. Defense Access Roads, described in 23 U.S.C. § 210.
3. Emergency Relief on Federally-owned roads, described in 23 U.S.C. § 125.

C. Activities Not Subject to this Agreement

This agreement does not apply to the Federal Highway Administration's Federal-Aid Highway activities and projects which are included in the Federal-Aid Highway program as described in 23 U.S.C. Chapter 1, Federal Aid Highways. Such federal-aid activities and projects are not considered direct federal actions for purposes of this MOU. Federal-aid funds pass to state and local governments (primarily Alaska Department of Transportation and Public Facilities). These agencies must conduct their activities consistent with the ACMP.

III. WFLHD Consistency Determination Procedure

The WFLHD agrees to use the following procedure for making a consistency determination for WFLHD activities and development projects conducted or authorized by the agency:

A. Determining if an Activity Affects the Coastal Zone

³ The term "Forest Highway Program" is described in Federal Highway Administration's regulation, 23 CFR § 660, Subpart A, which WFLHD uses to enhance transportation on forest highways that are under the public lands highway category of the coordinated federal lands highway program.

The WFLHD will review all WFLHD projects or activities, with the exception of activities listed in Appendix A of this MOU, to determine whether an activity may affect any land or water use or natural resource of Alaska's coastal zone. The WFLHD will use the following to help determine if an activity or project affects the coastal zone:⁴

1. 15 CFR § 930.33(b): FEDERAL AGENCIES SHALL CONSIDER ALL DEVELOPMENT PROJECTS WITHIN THE COASTAL ZONE TO BE ACTIVITIES DIRECTLY AFFECTING THE COASTAL ZONE. ALL OTHER TYPES OF ACTIVITIES WITHIN THE COASTAL ZONE ARE SUBJECT TO FEDERAL AGENCY REVIEW TO DETERMINE WHETHER THEY DIRECTLY AFFECT THE COASTAL ZONE.

15 CFR § 930.33(c)(1): FEDERAL ACTIVITIES OUTSIDE THE COASTAL ZONE, AS DEFINED IN CZMA § 304(1), ARE SUBJECT TO FEDERAL AGENCY REVIEW TO DETERMINE WHETHER THEY DIRECTLY AFFECT THE COASTAL ZONE.

2. Consideration of other applicable factors, including but not limited to whether:
 - a. the action causes a change in the manner in which land, water or other coastal zone natural resources are used;
 - b. the action causes a limitation on the range of uses of coastal zone natural resources; or
 - c. the action causes changes in the quality or quantity of coastal zone natural resources.
3. Consideration of cumulative and secondary effects. In its 1990 report reauthorizing the CZMA, Congress stated it was its intent that cumulative and secondary effects be considered when a federal agency makes a determination on whether a specific federal agency activity

⁴ Comment to 15 CFR § 930.33 encourages federal agencies to "construe liberally" an effect in borderline cases "so as to favor inclusion of Federal Activities subject to consistency review." 44 Fed. Register 37146 (1979).

affects any natural resource, land use, or water use in the coastal zone.⁵

4. Coordination. The WFLHD will coordinate with their client agencies (e.g. the Forest Service and the Alaska Department of Transportation) and with other affected state agencies, local governments, and coastal districts (including Coastal Resource Service Areas) to help assure the WFLHD highway projects' consistency with the ACMP. Consistency includes compliance with local ordinances, if any, used to implement local coastal district programs (e.g., floodplain regulation).

Accordingly, the WFLHD will consider direct and cumulative effects to resources in the project corridor caused by the WFLHD's activity, and effects which may be caused by other existing or reasonably foreseeable activities. Effects of WFLHD's activities on mitigative measures (e.g., vegetation buffers for water quality protection) or other reasonably foreseeable or existing projects are of particular concern.

B. Negative Determinations

⁵ See, H.R. Conf. Rep. No. 964, 101st Cong., 2d. Sess. 970 (1990), reprinted in 1990 U.S.C.C.A.N. 2374, 2675.

Pursuant to 15 CFR § 930.35(d) (1995), the WFLHD will provide a negative determination to DGC if the WFLHD determines an activity does not affect the coastal zone and does not require a consistency determination. The WFLHD will provide a brief description of the project and the reasons a consistency determination is not required. Pursuant to 15 CFR § 930.34(b) (1995), the WFLHD will provide the negative determination at least 90 days before final approval of the construction contract documents⁶ unless the WFLHD and DGC agree to an alternative notification schedule. To the extent consistent with CZMA § 307(c) (1) (C) and 15 CFR §§ 930.35(d) and 930.41 (c), the project can proceed if and when the State of Alaska concurs with the negative determination and necessary approvals are obtained. In the event the state does not concur with a WFLHD negative determination, and the disagreement cannot be resolved through informal negotiations, 15 CFR § 930.36 (1995) authorizes the WFLHD and the state to follow the mediation procedures described in Subpart G of the federal consistency regulations (15 CFR §§ 930.110 - 930.116 (1995)), or they may seek judicial review.

C. Determining if an Activity is Consistent with the Enforceable Policies of the ACMP

⁶ Note: "Final approval" of a federal activity is not defined in regulations and may take many forms. "Final approval" of a federal activity could mean approval of the planned activity at any stage after the project design stage. In order to avoid confusion, the WFLHD and DGC have agreed that "final approval" occurs at approval of construction contract documents, consisting of plans, specifications and estimates (PS&E).

If an activity or project affects the coastal zone, the WFLHD will determine whether the activity is consistent to the maximum extent practicable with the enforceable policies of the ACMP.⁷ The WFLHD will use all of the following to help determine if an activity or project is consistent with the ACMP:

1. ACMP standards identified in Title 6, Alaska Administrative Code, Chapter 80, as amended. The state *Guide to Preparing an ACMP Consistency Determination for Federal Activities* may be used to evaluate the planned activity's consistency with state coastal standards.
2. Approved district (including Coastal Resource Service Areas) coastal management program enforceable policies and definitions.
3. Information made available through the National Environmental Policy Act (NEPA) process (i.e., Environmental Impact Statement, Environmental Assessment, or Categorical Exclusion).⁸

⁷ "Consistent to the maximum extent practicable" is defined in 15 CFR 930.32 (1995). Based on the CZMA and implementing regulations, there are only three situations where a federal activity may deviate from full consistency with a state's approved coastal management program:

- (1) if existing federal law prohibits an agency from full compliance;
- (2) when circumstances arise after the approval of a state coastal management program which were unforeseen at the time of program approval and these circumstances present a "substantial obstacle" preventing "complete adherence" by the agency; or
- (3) through a presidential exemption authorized by CZMA § 307(c)(1)(B).

⁸ Comment to 15 CFR § 930.34(a) strongly encourages federal agencies "to provide consistency determinations to State agencies through use of existing notification procedures," such as NEPA documents, so long as such procedures are modified to comply with 15 CFR § 930 et seq. 44 Fed. Reg 37,147 (1979).

Before making a consistency determination, the WFLHD will analyze secondary and cumulative impacts by:

1. coordinating with federal, state, regional, and local agencies, as well as certain private citizens who may be affected; and
2. examining available plans such as for areas adjacent to or within the project area that may be affected by the proposed road construction.

D. Providing a Consistency Determination to the State

The determination in Part III. C will be provided to DGC using the following guidelines:

1. Timing: Pursuant to 15 CFR §930.34(b) and §930.35(d) (1995), the WFLHD will provide a consistency or negative determination to DGC at least ninety (90) days before final approval of the construction contract documents of the WFLHD activity or project, unless both WFLHD and DGC agree to an alternative notification schedule. To the extent consistent with CZMA § 307(c) (1) (C) and 15 CFR §§ 930.35(d) and 930.41 (c), the project can proceed when the final consistency concurrence is issued and other necessary approvals are obtained.
2. Content and Format: The determination must contain the information in a. below but may follow any of the formats described in a. through c.
 - a. Pursuant to 15 CFR § 930.39 (1995), the WFLHD will provide DGC with their consistency determination which shall include a brief statement of whether the proposed activity will comply with the ACMP "to the maximum extent practicable." WFLHD will base this statement upon an evaluation of the ACMP's relevant provisions, including the standards in 6 AAC 80 and district enforceable policies. The consistency determination shall include a description of the project, its associated facilities,

and coastal effects, as well as sufficient information to support WFLHD's consistency determination. This may include data such as design drawings or copies of permit applications. 15 CFR § 930.39(a) (1995) requires that "the amount of detail in the statement evaluation, activity description and supporting information shall be commensurate with the expected effects of the activity on the coastal zone."⁹

- b. A completed state *Guide to Preparing an ACMP Consistency Determination for Federal Activities* is intended to assist federal agencies meet federal consistency requirements and may serve as the consistency determination for activities conducted or authorized by the WFLHD.
- c. A consistency determination may be provided to the state as a part of WFLHD's NEPA documents.

IV. State Consistency Review Procedure

The state agrees to use the following procedure for reviewing a consistency determination and negative determinations submitted to the state by WFLHD:

A. Consistency Review Requirements

DGC will coordinate the state's review of the WFLHD's consistency determination under procedures contained in Title 6, Alaska Administrative Code, Chapter 50, as amended and in the manner provided in 15 CFR § 930 (1995). DGC will also provide a public notice as required by AS 46.40.096(c).

B. State Notification to WFLHD.

⁹ Comment to 15 CFR § 930.39 (a) strongly encourages federal agencies "to obtain the views and assistance of the State agency regarding" ACMP provisions "which are related to the proposed activity and the information necessary to determine whether the proposed activity will be conducted in a manner consistent to the maximum extent practicable with the management program." 44 Fed. Reg. 37,148 (1979).

DGC will notify the WFLHD of the state's agreement or disagreement with the consistency determination at the earliest practicable time, not to exceed forty-five (45) days after the start of the state's review. See 15 CFR § 930.41(a). The state is allowed to request an extension of up to fifteen (15) days. 15 CFR § 930.41(b). Due to the state's review schedule specified in 6 AAC 50.110(a), DGC automatically requests the 15-day extension. Additional extensions (past 60-days) are subject to WFLHD approval. See 15 CFR § 930.41(a) and (b). DGC would request additional extensions, if any, during the review for the following reasons.

1. Requests for Information: DGC may request additional information from the WFLHD if a commenting agency, an affected coastal district, or DGC (including consideration of a request from a citizen of an affected coastal district) determines that the information provided by the WFLHD is inadequate for the state to determine agreement or disagreement with the WFLHD consistency determination. The request will identify the information requested and the necessity of having the information to review the determination of the federal activity's consistency with the ACMP. See 15 CFR § 930.42(b) (1995), 6 AAC 50.070 (g).
2. No Response from DGC: WFLHD may presume DGC agreement with WFLHD's consistency determination if DGC fails to provide a response within 60 days from receipt of WFLHD notification. However, the WFLHD will contact DGC before making this presumption. See 15 CFR § 930.41(a) and § 930.41(b).

V. Coordinating a Consistency Determination with WFLHD's NEPA Process

Recognizing that it is difficult for the WFLHD to respond to state consistency concerns after issuance of a final NEPA document which contains a preferred course of action, the WFLHD agrees to use the following procedure to coordinate CZMA requirements and NEPA requirements.

A. Providing Necessary Information

The WFLHD will provide DGC with all needed project-related information during the early stages of WFLHD's NEPA process. DGC will help coordinate

the state's identification of potential coastal zone management issues for the WFLHD to consider during the NEPA process.

B. State Participation

Following its standard environmental procedures, the WFLHD will issue a preliminary environmental document which includes ACMP issues, impacts, and coordination results for public comment. DGC will help coordinate the state's participation in the public comment period.

C. Providing a Consistency Determination

The WFLHD has the following options for providing a consistency determination to DGC.

1. After the close of the NEPA public comment period, but before issuance of the final NEPA document, the WFLHD may submit a consistency determination based on its preferred alternative to DGC for state consistency review. DGC agrees to coordinate the state review of the consistency determination pursuant to the process and timelines specified in this agreement. If the state agrees with the WFLHD consistency determination, the WFLHD agrees to issue a final NEPA document providing the document includes alternative measures, if any, in the state's consistency finding. Any modification to the project in the final NEPA document that was not previously reviewed for consistency or that will not fully conform to the alternative measures in the state consistency finding shall be provided to DGC to determine, in consultation with other agencies, if further review is necessary; or
2. The WFLHD may provide its consistency determination to DGC as a part of its final NEPA document [i.e., the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) or Environmental Impact Statement (EIS)], including the Record of Decision (ROD); or
3. Any other options that are mutually acceptable.

VI. State Objection to a WFLHD Consistency Determination

A. State Response

In the event the state does not concur with an WFLHD consistency determination, the state will explain the reasons why the proposed activity is inconsistent with the ACMP and describe alternative measures, if any exist, that would allow the activity to proceed in a consistent manner.

B. Informal Negotiations

For any disagreement between DGC and the WFLHD, the agencies will first attempt to resolve differences through informal negotiations between agency representatives.

C. Mediation

If a disagreement cannot be resolved through informal negotiations, the state and the WFLHD agree to follow the mediation procedures described in Subpart G of the federal consistency regulations (15 CFR § 930.110 - 930.116) (1995):

1. The state, represented by DGC, and the WFLHD, represented by WFLHD's Division Engineer, will notify the Secretary of Commerce, in writing, of the existence of a serious disagreement and request the Secretary to mediate the disagreement.
2. Recognizing that the Secretary will not mediate a disagreement unless all parties agree to participate, the state and WFLHD agree to participate in the mediation process as long as practicable.

D. Judicial Review

Both the state and WFLHD agree to refrain from seeking judicial review until after informal negotiations and mediation have failed to resolve the disagreement.

VII. Consistency Determinations for Emergency Relief on Federally Owned Roads (ERFO)

Emergency relief funds for the repair or construction of federal roads suffering serious damage from natural disasters or catastrophic failures are provided through WFLHD

to federal land management agencies (FLMA's)¹⁰ who manage these facilities in Alaska. ERFO activities which are administered by WFLHD and described in 23 CFR 668.201-668.215 (1995) are usually divided into two parts, an emergency repair phase and permanent repair work.

In the emergency repair phase, all activities are considered categorical exclusions pursuant to the NEPA procedures in 23 CFR 771.117(c)(9) (1995) and the FLMA's are responsible, themselves, for addressing ACMP requirements. In the permanent repair work, the FLMA's are responsible for addressing both NEPA and ACMP requirements except where the FLMA has formally transferred the repair work to WFLHD for project development and construction. In such cases, WFLHD will follow the process and procedures required by 15 CFR 930.30 (1995) and discussed in Part IV of this MOU.

VIII. Defense Access Roads

Pursuant to 23 CFR §660.501-660.519 (1995) state and local highway agencies are expected to assume the same responsibilities for developing and maintaining access roads to permanent military facilities as they assume for public highways serving private establishments. During project development, the WFLHD will coordinate with state and local agencies and determine whether the proposed project will affect the coastal zone, as discussed in Section III.A. of this Memorandum. The WFLHD will provide the state with a negative determination or a consistency determination, as discussed in Sections III.B. and III.C. of this Memorandum. The WFLHD's Division Engineer will be responsible for necessary coordination between the selected agency and the state or local highway agencies during a defense access project's life. See 23 CFR § 660.515.

¹⁰ FLMA's are usually the U.S. Forest Service, National Park Service, Bureau of Land Management, or Bureau of Indian Affairs.

APPENDIX A

WFLHD Activities Not Requiring an ACMP Consistency Review

The WFLHD and DGC agree that the activities listed below have no significant effect on the coastal zone and do not need a state coordinated ACMP consistency determination.¹¹ **Exception: Any of the activities below that require an individual permit from a state or federal agency are subject to an individual state consistency review or negative determination pursuant to 6 AAC 50 and described in Sections III and IV of this MOU.** If a local permit is required for any of the activities below, WFLHD must obtain those permits prior to project initiation.

- 1) Activities which do not involve or lead directly to construction, such as planning and technical studies; grants for training and research programs; research activities as defined in 23 U.S.C. 307 that do not involve field demonstration; approval of statewide programs under 23 CFR Part 630; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed.
- 2) Approval of utility installations along or across an existing public agency transportation corridor that meet the following conditions:
 - a) overhead utilities must be located within existing, cleared easements that do not require explosives or significant clearing; and
 - b) below ground utilities must not cross resident or anadromous fish bearing streams, or result in siltation, loss of riparian habitat, or the use of explosives.
- 3) Construction of bicycle and pedestrian lanes, paths, and facilities within or adjacent to an existing road and within the road right-of-way that do not cross resident or anadromous fish bearing streams, or result in siltation, loss of riparian habitat, or the use of explosives. This does not include bicycle or pedestrian paths that are separated from a road and in their own independent right-of-way.

¹¹ However, these projects may require local land use permits or other authorizations necessary for implementation of local coastal district management programs.

- 4) The installation of noise barriers or alterations to existing publicly owned buildings to provide for noise reduction.
- 5) Landscaping.
- 6) Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur.
- 7) Transfer of funds to Federal Land Management Agencies for emergency repairs under 23 U.S.C. 125¹².
- 8) Acquisition of scenic easements.
- 9) Improvements to existing rest areas, overlooks and truck weigh stations.
- 10) Ridesharing activities.
- 11) Alterations to facilities or vehicles in order to make them accessible for elderly and handicapped persons.
- 12) Promulgation of rules, regulations, and directives.
- 13) Resurfacing of existing roads.
- 14) Traffic control improvements including signing, pavement markings, traffic signals and highway lighting
- 15) Intersection modifications including channelization, turn bays and lane configurations
- 16) Roadside safety improvements including guardrail, barriers, obstacle removal, fencing and slope adjustments within the existing right of way.

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¹² 23 U.S.C. § 125 authorizes an emergency relief fund for the Secretary of Transportation to use for the repair or reconstruction of highways, roads, and trails which the Secretary finds have been damaged by natural disaster or catastrophic failures from external causes.